Guideline Sentencing Update

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Criminal History

Consolidated or Related Cases

Supreme Court holds that decision whether an offender's prior convictions were consolidated for Guidelines purposes is reviewed deferentially. In *U.S. v. Buford*, 201 F.3d 937 (7th Cir. 2000), defendant pled guilty to armed robbery. She had five prior felony convictions for violent or drug-related crimes, any two of which would subject her to career offender status if they were not "related." *See* USSG §§4A1.2(a)(2), 4B1.1, and 4B1.2(c). Four robberies were related, but the district court held that the fifth conviction, a drug offense, was not related to the robberies because of a lack of formal consolidation, different prosecutors, separate proceedings, and little linkage between the crimes. Those factors outweighed defendant's claims that the offenses were related because the drug possession occurred around the same time as the robberies (which defendant said were motivated by her drug addiction), they had been "functionally consolidated" for sentencing, and she received concurrent sentences from the same judge. *See* §4A1.2, comment. (n.3).

The court of appeals determined that "whether cases have been 'consolidated' for trial or sentencing is a matter of fact, to be reviewed deferentially by the court of appeals," thus agreeing with the majority of circuits to decide this issue. *See* 201 F.3d at 941–42. Although "elements of Buford's situation support either characterization," the court affirmed because the district court "did not commit a clear error in finding that the joint sentencing was a matter of administrative convenience rather than a 'consolidation for sentencing.'" *Id*. at 942.

The issue for the Supreme Court was "should the appeals court review the trial court's decision deferentially or de novo? We conclude . . . that deferential review is appropriate, and we affirm." In this circumstance, "the district court is in a better position than the appellate court to decide whether a particular set of individual circumstances demonstrates 'functional consolidation.' . . . [A] district judge sees many more 'consolidations' than does an appellate judge. As a trial judge, a district judge is likely to be more familiar with trial and sentencing practices in general, including consolidation procedures. . . . Experience with trials, sentencing, and consolidations will help that judge draw the proper inferences from the procedural descriptions provided."

The Court added that "factual nuance may closely guide the legal decision, with legal results depending heavily upon an understanding of the significance of case-specific details. . . . And the fact-bound nature of the decision limits the value of appellate court precedent, which may provide only minimal help when other courts consider other procedural circumstances, other state systems, and other crimes."

Buford v. U.S., 121 S. Ct. 1276, 1278–81 (2001). *Cf. U.S. v. Hardin*, 248 F.3d 489, 493–95 (6th Cir. 2001) (affirmed: although not using it here because the case was argued before *Buford* was decided, stating that *Buford*'s deferential review standard would be appropriate for decision whether weapon was used "in connection with" another felony offense under § 2K2.1(b)(5)).

See *Outline* at IV.A.1.c and generally at X.C

Apprendi Issues

Mandatory Minimums

Sixth Circuit holds that *Apprendi* applies to imposition of mandatory minimum sentences; most circuits hold otherwise. A defendant in the Sixth Circuit was convicted of possession with intent to distribute cocaine. The district court sentenced him to a mandatory life term based on its finding that defendant possessed more than five kilograms of cocaine and had two prior felony convictions. 21 U.S.C. § 841(b)(1)(A). Although the indictment charged defendant with possession of 5.2 kilograms of cocaine, that issue was not decided by the jury.

Following *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), the appellate court reversed. "The ultimate effect of the trial judge's finding in this case is the same as the effect of the judge's finding in *Apprendi*: the trial judge made a factual finding that determined the appropriate length of the criminal sentence. More specifically, a finding as to the weight of the drugs determined the range of penalties that would apply to Flowal. Given Flowal's two prior felony convictions, life imprisonment without parole was mandatory if he possessed five or more kilograms of cocaine. 21 U.S.C. § 841(b)(1)(A). If he possessed less than five kilograms but more than 500 grams, he could be sentenced from ten years to life. . . . § 841(b)(1)(B). Finally, if he possessed less than 500 grams, he could be imprisoned as long as thirty years but would not face a statutory minimum. . . . § 841(b)(1)(C). Because the amount of the drugs at issue determined the appropriate statutory punishment, a jury should have determined the weight of the drugs beyond a reasonable doubt."

Although defendant could still receive a life term for possession of 4.997 kilograms [to which he admitted], "such a penalty is not mandatory under the latter provi-

sion. This difference is significant in this case because the trial judge's determination of the weight of the drugs took away any discretion in terms of imposing a shorter sentence. It is not a foregone conclusion that the trial judge would have sentenced Flowal to life without the possibility of release if a jury had determined the drugs weighed 4.997 kilograms. In fact, if the jury had determined that the drugs weighed less than 500 grams, a life sentence would not have even been an option . . . . The judge's determination effectively limited the range of applicable penalties and deprived Flowal of the opportunity to receive less than life imprisonment without the possibility of release." In sum, "a fact that increases the applicable statutory penalty range for a particular crime must be proved beyond a reasonable doubt to the trier of fact." The court remanded for resentencing, stating that, if the parties agree that sentencing under § 841(b)(1)(B) for 4.997 kilograms of cocaine is appropriate, submitting the issue of weight to the jury would not be necessary.

U.S. v. Flowal, 234 F.3d 932, 936–38 (6th Cir. 2000).

In a later case, where defendant received a mandatory twenty-year sentence under § 841(b)(1)(A) following a judicial finding of quantity, the court verified that the holdings of *Apprendi* and *Flowal* should be applied when the minimum sentence is increased. The court first stated that the second part of the "basic holding of *Apprendi* is . . . that it 'is unconstitutional for a legislature' to treat 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' as mere sentencing factors, rather than facts to be established as elements of the offense."

In combination with *Flowal*, then, "[a]ggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved. From a practical perspective, this means that when a defendant is found guilty of violating 21 U.S.C. § 841(a)(1), he must be sentenced under 21 U.S.C. § 841(b)(1)(C) unless the jury has found beyond a reasonable doubt that the defendant possessed the minimum amounts required by § 841(b)(1)(A) and § 841(b)(1)(B). Because in this case the government did not charge or attempt to prove to the jury a quantity of drugs that would permit a mandatory sentence, we remand this case to the District Court with instructions to sentence the defendant under 21 U.S.C. § 841(b)(1)(C) and in accordance with the U.S. Sentencing Guidelines."

U.S. v. Ramirez, 242 F.3d 348, 350–52 (6th Cir. 2001) (Siler, J., concurred in the decision because "we cannot overrule the decision of another panel," but "question[ed] whether *Apprendi* . . . is as far-reaching as we determine in this case, following *Flowal*"). *Cf. U.S. v. Camacho*, 248 F.3d 1286, 1289–90 (11th Cir. 2001) (following holding of *U.S. v. Rogers*, 228 F.3d 1318, 1327 (11th Cir. 2000) [11 *GSU* #2], that "drug quantity in section 841(b)(1)(A) and section 841(b)(1)(B) cases must be charged in the indictment and proven to a jury beyond a reasonable doubt," in finding that district court erred in sentencing defendant to mandatory minimum ten years under § 841(b)(1)(A) even though that was within otherwise applicable twenty-year maximum; however, error was harmless because defendant stipulated to amount of drugs that authorized the mandatory sentence).

Other circuits to decide the issue have held that, because *Apprendi* specifically stated that it did not overrule *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which allows imposition of a mandatory minimum term based on a preponderance of the evidence finding by a judge, *Apprendi* does not apply to the finding of facts that result in a mandatory sentence that is within the statutory maximum allowed by the jury's verdict. *See, e.g., U.S. v. Rodgers*, 245 F.3d 961, 965–67 (7th Cir. 2001) ("the Court's opinion in *Apprendi* leaves no doubt that *McMillan* remains good law insofar as mandatory minimum terms are concerned," and "since *Apprendi* was decided, we have specifically rejected the notion that a factual determination which has the effect of triggering a mandatory minimum sentence constitutes an element of the offense that must be submitted to the jury"); *U.S. v. Harris*, 243 F.3d 806, 809 (4th Cir. 2001) ("While the Supreme Court may certainly overrule *McMillan* in the future and apply *Apprendi* to any factor that increases the minimum sentence or 'range' of punishment, rather than only the maximum punishment, . . . that is not our role."); *U.S. v. LaFreniere*, 236 F.3d 41, 49–50 (1st Cir. 2001) (affirmed: refusing defendant's invitation "to read *Apprendi* more broadly to include mandatory minimums" and holding "that no *Apprendi* violation occurs when the district court sentences the defendant within the statutory maximum, regardless that drug quantity was never determined by the jury beyond a reasonable doubt"); *U.S. v. Pounds*, 230 F.3d 1317, 1319–20 (11th Cir. 2000) ("*Apprendi* is inapplicable" to imposition of mandatory ten-year term under 18 U.S.C. § 924(c)(1)(A)(iii) because "every conviction under § 924(c)(1)(A) carries with it a statutory maximum sentence of life imprisonment"); *U.S. v. Keith*, 230 F.3d 784, 787 (5th Cir. 2000) (affirming twenty-year mandatory term because under *Apprendi* and *McMillan* "a fact used in sentencing that does not increase a penalty beyond the statutory maximum need not be alleged in the indictment and proved to a jury beyond a reasonable doubt"); *U.S. v. Aguayo-Delgado*, 220 F.3d 926, 934 (8th Cir. 2000) (same). *Cf. U.S. v. Garcia-Guizar*, 234 F.3d 483, 489 (9th Cir. 2000) (affirming because "sentencing range of 168–210 months . . . exceeded the higher statutory minimum applied by the district court . . . [and] any *Apprendi* error could not have affected Garcia's sentence").

Effect on Sentencing Guidelines

Most circuits rule that *Apprendi* does not apply to application of the Sentencing Guidelines within the statutory maximum. Addressing a defendant's "assertion that *Apprendi* requires a district court to find drug quantities it considers to be a part of a defendant's relevant conduct beyond a reasonable doubt," the Seventh Circuit held that "pursuant to the sentencing guidelines, district courts may still determine a drug offender's base level offense by calculating quantities of drugs that were not specified in the count of conviction but that the court concludes, by a preponderance of the evidence, were a part of the defendant's relevant conduct, as long as that determination does not result in the imposition of a sentence that exceeds the statutory maximum penalty for that crime." *U.S. v. Jones*, 245 F.3d 645, 651 (7th Cir. 2001).

See also U.S. v. Sealed Case, 246 F.3d 696, 698–99 (D.C. Cir. 2001) ("declining to extend *Apprendi*" to Guidelines decisions within statutory range); *U.S. v. Sanchez*, 242 F.3d 1294, 1299–1300 (11th Cir. 2001) ("Because a finding under the Sentencing Guidelines determines the sentence within the statutory range rather than outside it, the decision in *Apprendi* . . . has no application to the Guidelines."); *U.S. v. Caba*, 241 F.3d 98, 101 (1st Cir. 2001) ("*Apprendi* simply does not apply to guideline findings (including, inter alia, drug weight calculations) that increase the defendant's sentence, but do not elevate the sentence to a point beyond the lowest applicable statutory maximum"); *U.S. v. Garcia*, 240 F.3d 180, 183–84 (2d Cir. 2001) ("a guideline factor, unrelated to a sentence above a statutory maximum or to a mandatory statutory minimum, may be determined by a sentencing judge and need not be submitted to a jury"); *U.S. v. Heckard*, 238 F.3d 1222, 1226 (10th Cir. 2001) ("Judges may still ascertain drug quantities . . . under the Sentencing Guidelines, so long as they do not sentence above the statutory maximum for the jury-fixed crime."); *U.S. v. Kinter*, 235 F.3d 192, 201–02 (4th Cir. 2000) ("Because *Apprendi* does not apply to a judge's exercise of sentencing discretion within a statutory range, the current practice of judicial factfinding under the Guidelines is not subject to the *Apprendi* requirements—at least so long as that factfinding does not enhance a defendant's sentence beyond the maximum term specified in the substantive statute."); *U.S. v. Williams*, 235 F.3d 858, 862–63 (3d Cir. 2000) (nothing in *Apprendi* precludes, and the holding of *Edwards v. U.S.*, 523 U.S. 511 (1998), supports, conclusion that jury finding is not required under Sentencing Guidelines where sentence is within statutory maximum); *U.S. v. Doggett*, 230 F.3d 160, 166 (5th Cir. 2000) ("The decision in *Apprendi* was specifically limited to facts which increase the penalty beyond the statutory maximum, and does not invalidate a court's factual finding for the purpose of determining the applicable Sentencing Guidelines.").

Harmless Error

Some circuits have held that, when there was "overwhelming" or uncontroverted evidence of drug quantity, there was no plain error or *Apprendi* error was harmless. For example, the Fourth Circuit affirmed, on review for plain error, lengthy sentences for several defendants convicted of conspiracy to distribute cocaine and cocaine base where drug quantity was neither charged in the indictment nor found by the jury. "[W]e easily conclude, beyond a reasonable doubt, that the jury verdict would have been the same had the jury been asked specifically to find whether the conspiracy in this case involved more than 5 kilograms of cocaine or 50 grams of crack cocaine. No defendant suggested that these amounts had not been proven at trial, and we conclude that the uncontroverted evidence demonstrated amounts hundreds of times more than the amounts charged. . . . In short, the evidence establishing the threshold amounts of cocaine and crack cocaine for life imprisonment sentences was not only overwhelming, but also uncontested." *U.S. v. Strickland*, 245 F.3d 368, 380–81 (4th Cir. 2001).

Other circuits have reached similar conclusions. *See, e.g., U.S. v. Terry*, 240 F.3d 65, 74–75 (1st Cir. 2001) (affirmed: because defendant did not contest quantity evidence, and essentially admitted to the charges in claiming a defense of entrapment, "[t]here is no question that the petit jury in this case would have found Terry's offenses to involve 50 or more grams of cocaine base"); *U.S. v. Anderson*, 236 F.3d 427, 429–30 (8th Cir. 2001) (affirmed: error harmless because "there was overwhelming evidence that appellants conspired to produce amphetamine in a quantity sufficient such that appellants' thirty-year sentences do not exceed the statutory maximum as proscribed by *Apprendi*"); *U.S. v. Nealy*, 232 F.3d 825, 829–30 (11th Cir. 2000) (affirmed: where 14.8 grams of cocaine base were seized from defendant's backpack, he did not contest that amount at trial or sentencing, and he was convicted of possessing that cocaine, "failure to submit drug quantity to the jury was harmless beyond a reasonable doubt" because "no reasonable jury could have rationally concluded that Defendant was guilty . . . but that the amount of cocaine [base] possessed was less than [the] 5 grams" necessary for sentencing under § 841(b)(1)(B)).

See also U.S. v. Noble, 246 F.3d 946, 955–56 (7th Cir. 2001) (remanded: although plain *Apprendi* error is harmless "when evidence supporting a sentence above the statutory maximum is overwhelming," here there was "limited physical evidence and minimal corroborating testimony" insufficient to support quantity finding); *U.S. v. Wims*, 245 F.3d 1269, 1273–74 (11th Cir. 2001) (affirmed: where purchase of six kilograms of cocaine was undisputed at trial and sentencing and only issue was whether drugs belonged to defendant, "jury's guilty verdict reveals that they did attribute the drugs to Wims" and it was not plain error to sentence him to life term based on court's

finding of that amount); *U.S. v. Fields*, 242 F.3d 393, 398 (D.C. Cir. 2001) (affirmed: although "the issue of leadership must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt" when it "may increase a defendant's sentence beyond the prescribed statutory maximum," as here, "the record evidence overwhelmingly demonstrates that Fields managed and masterminded various offenses" and "there is proof beyond a reasonable doubt that Fields held a leadership role in the criminal activities for which he was convicted").

Several circuits also find harmless error or no plain error when the defendant had stipulated or otherwise agreed to the amount of drugs used in sentencing. In the Eleventh Circuit, defendant had "stipulated to the quantity of drugs involved in his crime—39.77 kilograms. The stipulation took the issue away from the jury, and the jury's guilty verdict on the substantive offense rested upon the quantity to which [he] stipulated. The stipulation thus acts as the equivalent of a jury finding on drug quantity . . . [and] the imposition of [his] sentence under section 841(b)(1)(A) was error [under *Apprendi*]—but harmless error." *U.S. v. Camacho*, 248 F.3d 1286, 1290 (11th Cir. 2001).

See also U.S. v. DeLeon, 247 F.3d 593, 597–98 (5th Cir. 2000) (affirmed: "neither the omission of a specific drug quantity from the indictment nor the absence of a jury charge on drug quantity rises to the level of plain error" when "defendant stipulated at trial that the substance seized was 1035.2 pounds (469.47 kilograms) of marijuana," which supported sentence under § 841(b)(1)(B); also noting that use of drug quantity range in the indictment, rather than precise amount, satisfies *Apprendi*); *U.S. v. Duarte*, 246 F.3d 56, 62–64 (1st Cir. 2001) (affirmed on plain error review because defendant "signed a plea agreement in which he unequivocally accepted responsibility for a specified amount of drugs (1,000 to 3,000 kilograms) . . . [that] took any issue about drug quantity out of the case"); *U.S. v. White*, 240 F.3d 127, 134 (2d Cir. 2001) (affirmed: *Apprendi* error was harmless in sentencing defendant for sale of cocaine base because "the parties entered stipulations regarding the type and quantity of drugs involved . . . , well over the 5 gram minimum required for sentencing under section 841(b)(1)(B)"); *U.S. v. Jackson*, 240 F.3d 1245, 1249 (10th Cir. 2001) (defendant "stipulated to a quantity of cocaine base at trial (24.36 grams) sufficient to support a sentence of up to forty years under . . . §841(b)(1)(B); therefore, drug type and quantity were no longer facts required to be determined by the jury"); *U.S. v. Poulack*, 236 F.3d 932, 938 (8th Cir. 2001) (no plain error in sentence where defendant stipulated to quantity used by court in sentencing).

See *Outline* generally at II.A.3.a and c.

Note to readers: *U.S. v. Angle*, 230 F.3d 113 (4th Cir. 2000), summarized in 11 *GSU #2*, was vacated for rehearing en banc on Jan. 17, 2001.

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